Appeal No. 2004AP1793 **Cir. Ct. No. 2003CV33**

WISCONSIN COURT OF APPEALS
DISTRICT IV

SHANE T. DRINKWATER,

PLAINTIFF-RESPONDENT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, JASON R. HONSHEL AND ADDITIONAL FICTIONAL PARTY #1 AND ADDITIONAL FICTIONAL PARTY #2,

DEFENDANTS,

MEDICAL ASSOCIATES HEALTH PLANS,

SUBROGATED DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Lundsten and Higginbotham, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2003-04),[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination. The issue is whether the choice-of-law and subrogation provisions in a health insurance policy issued by an Iowa employer to a Wisconsin resident should be given effect in a Wisconsin tort case, without regard to Wisconsin's "made whole" doctrine. Wisconsin's "made whole" doctrine requires injured

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

plaintiffs to be fully compensated before the subrogated party receives payment. Failure to apply this doctrine to the insurance policy in this case results in substantially lower overall coverage for the injured party. Resolution of this question will require a public policy analysis that weighs Wisconsin policies that help ensure compensation of injured plaintiffs against the contractual rights and expectations of out-of-state employers and insurers.

The parties agree on the facts relevant to the appeal. Shane Drinkwater was badly injured in an automobile accident in Wisconsin. He commenced this action for personal injuries. The tortfeasor's insurer paid its policy limit. Medical Associates Health Plan paid for health care services to Drinkwater pursuant to a health insurance plan provided by Drinkwater's employer. Drinkwater is a Wisconsin resident, employed by an Iowa employer to perform work in Iowa. The health insurance plan contains a subrogation clause and also a choice-of-law provision stating the agreement shall be governed by and interpreted in accordance with the laws of Iowa. Medical Associates filed a motion in this action to obtain payment pursuant to its subrogation right.

Wisconsin case law provides that the subrogated party will not be paid unless the injured plaintiff has been "made whole." *See* ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis. 2d 263, 276, 316 N.W.2d 348 (1982). The made-whole doctrine in an insurance context has been described as a "traditional equity principle" under which a party claiming subrogation rights may not recover until the insured is fully compensated for his or her losses. ***Ruckel v. Gassner***, 2002 WI 67, ¶17, 253 Wis. 2d 280, 646 N.W.2d 11. The burden of loss should rest on the party paid to assume the risk and not on an inadequately compensated insured. ***Id***. Once the insured has been fully compensated, however, any additional recovery by the insured would constitute unjust enrichment. ***Id.*** The subrogated

party is therefore entitled to assert its subrogation claim once the insured has been made whole. ***Id.*** The parties agree that Iowa law rejects the made-whole doctrine.

In addition, the Wisconsin Supreme Court has held that "a subrogation clause in an insurance contract may not override the made-whole doctrine no matter how clearly and explicitly the clause states the parties' intention to do so." ***Ruckel***, 253 Wis. 2d 280, ¶4. Notwithstanding that holding, Medical Associates argued its subrogation request should be analyzed under Iowa law, as provided for in the policy, rather than under Wisconsin's "made-whole" doctrine. The circuit court held that the Wisconsin rule should apply and, after an evidentiary hearing, concluded the insurance amount paid is not sufficient to compensate Drinkwater for all his damages and therefore Medical Associates is not entitled to payment. Medical Associates appeals from that order.

The parties' legal dispute, at its most basic level, starts with a disagreement about the nature of the case. Medical Associates argues the "current action is between [Drinkwater] and Medical Associates and stems from a contractual relationship, not a tort action." Drinkwater responds: "This is a tort action, not a contract action." Beyond that, the parties' arguments rely on choice-of-law doctrine, the policies underlying Wisconsin tort law and other public policies relating to insurance, contracts of adhesion, comity with other states, and the potential implications of accepting employment in another state. The need to balance choice-of-law and policy concerns is similar to another recent case, ***Beilfuss v. Huffy Corp.***, 2004 WI App 118, 274 Wis. 2d 500, 685 N.W.2d 373. In that case, we held a choice-of-law provision should be evaluated in light of public policy and such a provision in a particular employment contract was invalid in light of Wisconsin's strong public policies related to covenants not to compete. ***Id.***, ¶¶9-16.

In the present case, it is apparent the issue is important statewide and in neighboring states and will require balancing of public policy interests with regard for comity with other states. Accordingly, we believe the issue is appropriate for resolution by the supreme court.